ALIBIS

Visiting Sick Friend (27)

Bonanno
Bonventre
Bufalino
Castellano
Cucchiara
D'Agostino
DeSimone
Evola
J. Falcone
S. Falcone
Gambino
Lombardozzi
Magaddino
Magliocco
Miranda
Ormento
Osticco
Profaci
Rava
Riccobono
Riela
Sciandra
Tornabe
Turrigiano
F. Valenti
S. Valenti
Zicari

Not Present (7)

Alaimo
Carlisi
DeMarco
LaDuca
Larasso
Majuri
Scalish

Other (9)

Cannone
Gudrnieri
Guccia
Ida
P. Monachino
S. Monachino
J. Montana
Scortino
Scozzari

None (17)

Barbara, Jr.
Barbara, Sr.
Catena
Chiri
Civello
Colletti
M. Genovese
V. Genovese
LaGattuta
LaRocca
Mancuso
Mannerino
Oliveto
Rao
Rosato
Trafficante
Zito

(Attachment D)

GENERAL EVIDENCE OF CONCEALMENT

In addition to the actions set forth in attachments A and B that can be attributed to specific individuals or groups, there is evidence of certain general conduct to conceal as follows:

After the roadblock was discovered, 10-12 persons were seen running from the Barbara house into the woods, and there were probably many more. Some, but probably not all of these persons were later picked up. Bonanno, Bonventre, Magaddino, Montana and Trafficante were stopped in the woods or the cornfield, the Troopers on two occasions finding it necessary to fire warning pistol shots; Larasso and Majuri and the LaDuca, Carlisi, DeMarco, Scalish group were stopped in cars on the road, after getting through the woods.

LaDuca's pink Lincoln and a dark Cadillac were hidden in the Barbara barn on November 14. The Cadillac was driven off Sunday November 17 by two men who had stayed at the Barbara house since the meeting; they had been identified as Peter Barbara's college friends to the maid, although they were obviously much older men. The Troopers picked up LaDuca's car Sunday, with some of Stefano Magaddino's personal effects in it.

Other men may have remained at the Barbara house after November 14, 1957. The maid wasn't permitted to clean the downstairs guest rooms, but did see some strange luggage

CONSPIRATORS WHO ESCAPED

The proposed indictment names only 60 Apalachin attendants as co-conspirators or defendants. In addition, there is reliable evidence that a large number of other persons were present but escaped through the woods or by hiding in the Barbara house, as follows:

Nicholas Civella and Joseph Filardo of Kansas City were stopped in a taxi and claimed that they had been on a train bound for New York City and had stopped off in the area looking for a woman.

Joseph Cerrito of Los Gatos and James J. Lanza of Burlingame, California, were at the Hotel New Yorker November 11-12 with DeSimone and Scozzari, and at Scranton's Hotel Casey as Bufalino's guests November 13, with DeSimone, Scozzari and Civello.

Some of Salvatore Magaddino's personal effects were in a suitcase in the trunk of the LaDuca car when it was found hidden on the Barbara property by the Troopers on Sunday, November 17.

John Montana's nephew Charles was checked in with LaDuca at the Hotel Utica, and his torn hotel bill was found at the Parkway Motel in a wastebasket in LaDuca's room. In addition, a man identifying himself as Charles Montana asked to make a telephone call November 14 from the Parkway Motel, but changed his mind when the proprietor said he had to have the number.

Carmine Galente was seen by the Barbara maid November 14, and is identified by her as one of two men who stayed in the Barbara house as Peter Barbara's friends until they drove off in one of the concealed cars on Sunday, November 17. Galente had also attended a similar but smaller meeting in the area the previous year.

None of the above evidence is sufficiently corroborated or persuasive to warrant naming these persons as conspirators at this time.

There are lesser indications that the following were present:

William Medico, Pittston, Penna. (see next paragraph)
Neil Migliore, New York, NY (whose car was discovered hidden on the Barbara property)
Paul Scarcelli, New Orleans, La. (who rented a Hertz car and drove away Nov. 14)
Joseph Zerilli, Grosse Pointe Park, Michigan (who also rented a Hertz car and drove away November 14)

It should be pointed out that those who escaped were probably of stature in the group. In particular, William Medico appears to have played a key part in the Apalachin meeting, being at Barbara's November 6 with Bufalino, and firmly supporting Osticco's and Montana's alibis, probably to the point of creating a false documentary record.

COOPERATION IN SPECIFIC FALSE ALIBIS

1. Alaimo, Zicari, Osticco, Sciandra, Bufalino, Guarnieri, (Alaimo not present)
2. Carlisi, LaDuca, Scalish, DeMarco (none present)
3. Larasso, Majuri (neither present)
4. Cucchiara, Evola, Riccobono (Cucchiara arrived alone)
5. Miranda, Rava (Miranda arrived alone)
6. Turrigiano, Zicari (both making coffee)
7. Sciandra, Guarnieri (Sciandra making coffee)
8. Osticco, Sciandra, Zicari, Turrigiano, (Osticco repairing a pump)
9. Guarnieri, Turrigiano (Guarnieri delivering shirts)
10. Montana, Magaddino (repairing their car)
11. P. Monachino, S. Monachino, Sciortino (renting a beer trailer)
12. Profaci, Magliocco (got lost)

(Attachment G)

GROUP ACTION

Known Joint Arrivals

1. Olivetto, Ida
2. Bufalino, Civello, DeSimone, Scozzari
3. M. Genovese, Larocca
4. Osticco, Sciandra, Alaimo
5. J. Falcone, S. Falcone, D'Agostino
6. Evola, Riccobono, Cucchiara, Lombardozzi
7. Gambino, Castellano, Rava, Miranda
8. Magliocco, Profaci
9. S. Monachino, P. Monachino, Sciortino
10. Guarnieri, Turrigiano
11. Larasso, Majuri
12. Montana, Magaddino
13. S. Valenti, F. Valenti
14. LaDuca, Carlisi
15. DeMarco, Scalish

Known Joint Departures

1. Bufalino, V. Genovese, Catena, Olivetto, Ida
2. Mannerino, M. Genovese, Osticco
3. Alaimo, Zicari
4. J. Falcone, S. Falcone, D'Agostino, Mancuso
5. Gambino, Castellano, Rava, Miranda
6. Guarnieri, S. Monachino, P. Monachino, Sciortino
7. LaRasso, Majuri
8. Scalish, LaDuca, DeMarco, Carlisi
9. S. Valenti, F. Valenti
10. Evola, Riccobono, Lombardozzi, Cucchiara
11. Magliocco, Profaci
12. Bonanno, Banventre
13. Montana, Magaddino

(Attachment H)

Known Joint Accomodations - November 13, 1957

Airport Motel	-	Zito, Colletti (owned by Bonanno and Riela)
Arlington Hotel	-	M. Genovese, Larocca
Carlton Hotel	-	Evola (with Del Motel group)
Hotel Casey	-	DeSimone, Scozzari, Civello (Bufalino host)
Del Motel	-	Lombardozzi, Riccobono Cucchiara, Chiri
Parkway Motel	-	Carlisi, LaDuca, Scalish, DeMarco
Sahara Motel	-	Frank and Stanley Valenti
Wright Motel	-	Castellano, Gambino, Rava, Miranda

TO : Milton R. Wessel

FROM : Gerard L. Goettel

SUBJECT: Possible Prosecution of the Delegates to the Apalachin Meeting.

You have asked me to prepare a memorandum of law covering the basic legal considerations in a possible prosecution of the Apalachin delegates resulting from the Grand Jury investigation. Concerning the wall of silence that has blocked the Federal inquiries, the crimes which come most quickly to mind are perjury, obstruction of justice, contempt, and conspiracy.

Perjury becomes an obstruction of justice when the false statements have as their effect and purpose the hindering and obstructing of the administration of justice. If committed within the jurisdiction of the court, the defendant may be punished for contempt even though an indictment for obstruction of justice would lie. In re Brule, 71 F. 943 (D. Nev. 1895). The procuring of false testimony can be both an obstruction of justice and a subornation of perjury, and the prosecutor is not required to elect which offense it will prosecute, but can pursue both. Catrino v. United States, 176 F.2d 884 (9th Cir. 1949). Needless to say, if a conspiracy exists to violate the laws of the United States, it is a separate crime. I will discuss each offense separately.

PERJURY

Speaking generally, perjury is:

> "The willful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding . . . . upon oath . . . . , such assertion being material to the issue or point of inquiry and known to such witness to be false." Black, Law Dictionary (3d Ed.)

The most obvious stumbling block to a perjury indictment is the well known, albeit somewhat misnamed, "Two Witness Rule". The general rule is that the falsity of the statement charged to be perjured must be established by two witnesses, or by one witness supported by independent evidence. United States v. Hiss, 185 F.2d 822, (2d Cir. 1950) cert. den. 340 U.S. 948. The harsh strictures of the Two Witness Rule have led to a variety of evasions. For example, it has been held that the testimony of any number of witnesses is not a prerequisite to a conviction of perjury, and that it may be accomplished with proof of the

defendant's own acts, business transactions, documents, and correspondence, or with the testimony of one witness and an admission of the defendant. Phair v. United States, 60 F.2d 953 (3d Cir. 1932). Indeed, it has even been said that an extra-judicial admission and extrinsic circumstances can be sufficient. See Jordan v. United States, 60 F.2d 4 (4th Cir. 1932), cert. den. 287 U.S. 633.

Many cases have made it evident that the "Two Witness Rule" is not actually a two witness rule. What it really means is that the falsity of the testimony given by the defendant cannot be established simply upon the contradictory testimony of one witness. It clearly requires something more than that. Regardless, however, of what may be substituted in place of the testimony of a second witness, or indeed even for the testimony of the first witness, one thing is abundantly evident--there must be some sort of direct evidence proving the contradictory of the testimony which is claimed to be perjurious, and even the most convincing circumstantial evidence is insufficient for a Federal perjury prosecution. Radomsky v. United States, 180 F.2d 781 (9th Cir. 1950); United States v. Otto, 54 F.2d 277 (2d Cir. 1931).

Unfortunately, in the instant case, almost all the proof that the witnesses knew there was to be a meeting, were acquainted with the persons there, and were (or became) aware of the purpose of the gathering, is circumstantial. With one or two witnesses we have some direct and independent evidence, but with most, the only direct evidence would be the contradictory testimony of the remaining witnesses which are contradictory on minor and insignificant matters which might not be considered material.

Of course, there is always the possibility, in light of the liberality with which the materiality of testimony before a grand jury is treated, of indicting some of the persons for committing perjury on minor testimony alone. As a practical matter, however, it would be worthless to attempt to indict them in that manner, for the following reasons:

1. The contradictory testimony could probably never be produced, since the witnesses would claim their Constitutional privilege upon the stand. (They have not waived their privilege at trial by testifying before a grand jury).

2. On most of the immaterial inconsistencies, the testimony balances off so that there is as much testimony for one side as for the other.

3. To the extent that we would be able to uncover a situation where one witness' testimony was out of line with the others, it is quite possible that he is telling the truth and is only inconsistent because he has not been taken into the confidence of the others as to what the concocted alibi will be.

4. Any perjury testimony resting upon the internal inconsistencies of the other witnesses would require both a value judgement as to whose testimony was truthful, and whose false, and would require not indicting the majority of the witnesses, who would have to be called by the Government.

CONTEMPT

It is well settled law that false, evasive and contumacious testimony constitutes a criminal contempt of court. Camarota v. United States, 111 F.2d 243 (3d Cir. 1940), cert. den. 311 U.S. 651 (1940). This is true even though the answers are so clearly false as to constitute perjury: "The power of the court to treat as a criminal contempt a persistent perjury which blocks the inquiry is settled by authority in this circuit." Judge Learned Hand in United States v. Appel, 211 Fed. 495 (S.D.N.Y. 1913). It is not, however, necessary that the answers be clearly perjurious Evasive and vague answers given when it is apparent that the witness could if he wished give a direct answer, also constitute contempt. Schleier v. United States, 72 F.2d 414 (2d Cir. 1934), cert. den. 293 U.S. 607, Lang v. United States, 55 F.2d 922 (2d Cir. 1932), cert. dism. 285 U.S. 523.

Perjurious testimony obviously obstructs the administration of justice and, by parity of reasoning, should be punishable as contempt. This logic, however, founders on the principle that the safeguards afforded to a person accused of a crime shall not be circumvented. Accordingly, a compromise has been forged between this principle and those underlying the power to punish for contempt. False testimony is punishable as contempt if it obstructs the administration of justice to a degree not inherent in all false testimony. Ex parte Hudgings, 249 U.S. 378 (1919); In re Michael, 146 F.2d 627, revd. 326 U.S. 224 (1945).

An illustration of the difficulty in applying the formula is suggested by the fact that both the Hudgings and the Michael cases distinguished the case of United States v. Appel, supra, as one in which the element of obstruction was clearly shown because the answers of the witness were so vague as to leave no doubt that he concealed information. Indeed, the cases in the 2d Circuit during that period (1930's) were almost peremptory in their judgment that grand jury testimony was false. The rationale of their approach is made evident by the case of United States v. McGovern, 60 F.2d 880 (2d Cir. 1932), cert. den. 287 U.S. 650, where the court said (at page 889):

> "A wiley witness who avoids the danger of a blunt refusal to answer by mere lip service to his duty and conceals the truth by the use of words may be as obstructive as his fellow of less mental agility who simply says nothing."

In the above case the court considered the inherent incredibility of the testimony and declared it preposterous and incredulous, stating (page 890) that the witness ". . . . having resorted persistently to subterfuge and evasion, if not to deliberate falsifying", was guilty of obstructing justice.

The upshot of the matter is that the courts have viewed answers obviously designed to withhold information as sufficiently obstructive as to warrant punishment for contempt without a special showing of obstruction.

Concerning the witnesses who have testified about the Apalachin meeting, it is self-evident that if their testimony is false they have obstructed the grand jury's inquiry. The paramount problem is proving that their testimony is false.

If the 2d Circuit cases of the 1930's be taken on their face, it would appear that little more would be necessary than to present the consolidated testimony of all of these witnesses. However, it should be noted that the number of reported criminal contempts for false testimony has dwindled away to almost nothing. One obvious reason for this is that the broader scope given to the Fifth Amendment by the Supreme Court in the last decade has made it possible for witnesses to claim their privilege almost unrestrictedly. As a result, they are rarely compelled to offer the vague and dissembling type of testimony which was necessary when claims of privilege were so stringently restricted. More important, however, there has been a distinct tendency on the part of the Supreme Court to require that the falsity of the testimony be proven beyond a reasonable doubt, and the old reliable "inherent incredibility" can no longer be counted upon. For this reason alone, a contempt proceeding does not appear too inviting.

A more practical and cogent consideration arguing against the institution of contempt proceedings is the evidentiary problem, particularly as it relates to a comparison of the testimony of the other witnesses. It appears that more than one person may be charged in a single contempt proceeding. United States v. Brown, 116 F.2d 455 (7th Cir. 1940); In re Fellerman, 149 F. 244 (S.D.N.Y. 1906). This does not mean, however, that their testimony may be considered in terms of conscious parallel action, or compared for inconsistencies as might perhaps be done in a conspiracy. Indeed, in order to charge a conspiracy to commit contempt, an indictment would be necessary, and it would be in effect charging (and might just as well charge) a conspiracy to obstruct justice.

An additional consideration which argues against the use of contempt proceedings is the fact that sentences are usually fairly short, not running, for false testimony, more than a few months. Contempt sentences of a year or more appear usually to be given only when a witness directly defies an order of the court. However, it has been held that in a civil contempt the defendant can be held by the marshal until he testifies truthfully--as is now being done by the New York State authorities. Howard v.

United States, 182 F.2d 908 (8th Cir. 1950). It appears wisest, however, not to resort to contempt proceedings unless no other prosecution appears possible.

OBSTRUCTION OF JUSTICE

In theory it would appear that a person can be indicted for obstructing justice because of his own false testimony which impeded a grand jury investigation, since this would, by definition, be impeding the due administration of justice. In practice, however, there would be no necessity of so indicting him if the obstruction was so flagrant, since he could be cited for contempt, United States v. Pearson, 62 F. Supp. 767 (ND Cal. 1945) or, if the evidence was sufficiently strong, for perjury. Catrino v. United States, supra. I can find no reported case in which a witness was indicted for the substantive offense of obstructing justice on the basis of his false testimony alone. It appears that most indictments for obstructing justice by false testimony are a part of a conspiracy charge. This is discussed in the next section.

In the present situation it is doubtful whether we could prove an obstruction of justice case against any one individual defendant, except those against whom we have a perjury charge, since, as already discussed in regards to perjury, we would not probably have available to us the testimony of the other witnesses. We cannot introduce their grand jury testimony without proving a conspiracy, and if a conspiracy can be proved, it is far preferable tactically to have one indictment of all the witnesses.

In addition, to indict some defendants for perjury, and others for obstructing justice, where both have committed the same acts, would dramatize the fact that the obstruction charge is simply a means of avoiding the Two Witness Rule. This is particularly undesirable since I believe there is a good possibility of making a case of conspiracy to obstruct justice by the giving of false testimony.

CONSPIRACY TO OBSTRUCT JUSTICE BY THE GIVING OF FALSE TESTIMONY

A. Conspiracy

The particular advantage of the conspiracy indictment is the liberality with which circumstantial evidence may be adduced. Circumstantial evidence is permissible in conspiracy cases to establish a common purpose or plan, United States v. Manton, 107 F. 2d 834 (2d Cir. 1939), cert. den., 309 U.S. 664 (1940); Peters v. United States, 160 F. 2d 319 (8th Cir. 1947), cert. den., 331 U.S. 825 (1947), or to show participation in the conspiracy, Rumely v. United States, 293 Fed. 532 (2d Cir. 1923), cert. den., 263 U.S. 713 (1923). Criminal intent and guilty knowledge, seldom provable by direct evidence, may be shown by circumstantial evidence. Estep v. United States, 140 F. 2d 40 (10th Cir. 1943).

Circumstantial evidence is not sufficient to establish a desired conclusion where the circumstances give equal support to opposite conclusions. Cox v. United States, 96 F. 2d 41 (8th Cir. 1938). However to establish guilt, the 2d Circuit has consistently held that the circumstantial evidence need not exclude every reasonable hypothesis of innocence; it is enough that the jury be satisfied beyond a reasonable doubt of the defendant's guilt. United States v. Simone, 205 F. 2d 480 (2d Cir. 1953); United States v. Valenti, 134 F. 2d 362 (2d Cir. 1943), cert. den., 319 U.S. 761 (1943); United States v. Becker, 62 F. 2d 1007 (2d Cir. 1933).

> "But to say . . . . that all inferences drawn from facts in evidence must be consistent only with guilt and inconsistent with every reasonable hypothesis of innocence, or that there must be no reasonable doubt as to each chain of proof is to confuse . . . . the nature of the proof required in criminal cases . . . . Nor is the jury to be limited to drawing only the inference most favorable to the accused." United States v. Valenti, supra, at 362.

In proving a conspiracy the main elements to be proved, other than overt acts, are the common illicit purpose of a group of persons and the defendant's participation in the execution of that common purpose. Since one of the main features of the conspiracy is secrecy, direct proof of the conspiracy is usually unavailable and the relevancy of circumstantial evidence for this purpose has been accepted without question. Thus in United States v. Manton, supra, the 2d Circuit stated:

> "It is not necessary that the participation of the accused should be shown by direct evidence. The connection may be inferred from such facts and circumstances in evidence as legitimately tend to sustain that inference. Indeed, often it not generally, direct proof of a criminal conspiracy is not available and it will be disclosed only by a development and collocation of circumstances. In passing upon the sufficiency of the proof, it is not our province to weigh the evidence or to determine the credibility of witnesses. We must take that view of the evidence most favorable to the government and sustain the verdict of the jury if there be substantial evidence to support it." Sutherland, J. at 107 F. 2d 834, 389 (2d Cir., 1939), cert. den. 309 U.S. 64. See also United States v. Potash, 118 F. 2d 54 (2d Cir. 1941) cert. den. 313 U.S. 584 (1941).

A case in point where the conspiracy and its unlawful purpose were established entirely by circumstantial evidence is Reavis v. United States 106 F. 2d 982, 984 (10th Cir. 1939). There the court pointed out that:

> "The crime of conspiracy is in essence two or more persons combining and confederating with the intent and purpose of committing a public offense by the doing of an unlawful act or the doing of a lawful act in an unlawful manner. It is not essential that the agreement be in any specified form or that any particular words be used. It is enough if the minds of the parties meet and join in an understanding way to accomplish a common purpose. A conspiracy is rarely susceptible of direct proof as conspirators seldom reduce their agreements to writing or make public their unlawful plans. But direct proof is not necessary. The offense may be proved by circumstantial evidence. It may be deduced from statements, acts and conduct of the parties."

See also Castle v. United States, 238 F. 2d 131 (8th Cir. 1956); Beland v. United States, 117 F. 2d 958 (5th Cir. 1941, cert. den. 313 U.S. 585; Goode v. United States, 58 F. 2d 105 (8th Cir. 1932), and United States v. Minkoff, 137 F. 2d 402 (2d Cir. 1943).

This reliance of the courts on completely circumstantial evidence has been upheld by the Supreme Court in the case of Glasser v. United States, 315 U.S. 60 (1942). At page 80, the court said:

> "Participation in a criminal conspiracy need not be proven by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.' United States v. Manton, supra."

Indeed, in many of the recent criminal Antitrust cases the courts have relied almost completely upon what they called "conscious parallelism". An example of this is the American Tobacco case where the Circuit Court said:

> "The agreement may be shown by a concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose. It is the common design which is the essence of the conspiracy or combination, and this may be made to appear when the parties steadily pursue the same object, whether acting separately or together, by common or different means, but always leading to the same unlawful result." American Tobacco v. United States, 147 F 2d 93, 107 (6th Cir. 1944) reh. den. 324 U.S. 891, aff'd 328 U.S. 781.

The interesting aspect of a conspiracy indictment in this case is that while the jury would no doubt need to be convinced of the overall falsity of the testimony given before the grand jury, in order to be compelled to infer the existence of a combination with an unlawful purpose, they would not, as a matter of law, need to make a finding that the testimony, taken individually or in its entirely, is false. The reason for this is that in a conspiracy case you do not have to prove the comsummation of the purpose of the conspiracy. Outlaw v. United States, 81 F. 2d 805 (5th Cir. 1936), cert. den. 298 U.S. 665; Williamson v. United States, 207 U.S. 425 (1908); Wilder v. United States, 143 F. 433 (4th Cir. 1906), cert. den. 204 U.S. 674. This surprisingly, is true even though the substantive offense is charged as an overt act, as it must here be. Hall v. United States, 78 F. 2d 168 (10th Cir. 1935). The rationale is that:

> ". . . . they are separate and distinct offenses even though the substantive offense is charged as one of the overt acts committed in furtherance of the conspiracy. Neither is merged into the other." Upshaw v. United States, 157 F. 2d 716, 717 (10th Cir. 1946).

This approach, of course, is an easy device for escaping the stringencies of the Federal law as to perjury. In both the Outlaw and Hall cases it is patently clear that the indictments were framed as conspiracies to impede and obstruct justice by perjury because the perjury could be proved only by one witness. The appellants in both cases apparently argued vigorously that they were being convicted, in effect, of perjury on the testimony of only one witness. In both cases, however, the court replied that they were being convicted of a conspiracy, and that therefore the perjury rules do not apply.

B. Types of Conspiracies

The advantages of a conspiracy indictment being obvious, we turn to the substance of the charge. The Federal criminal statute concerning conspiracy, Section 371 of Title 18, reads as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned nor more than five years, or both."

It is permissible under this statute (and the common procedure), to indict defendants for a conspiracy to commit a specific Federal offense. However, according to the alternative wording of the statute, ". . . . or to defraud the United States or any agency thereof in any manner or for any purpose", a conspiracy need not allege, as its unlawful purpose, the commission of a specific Federal crime. On occasions defendants have been charged with a "general" conspiracy. See e.g. Williamson v. United States, supra; Outlaw v. United States, supra; Biskind v. United States, 281 F. 47, (6th Cir. 1922), cert. den. 260 U.S. 731.

If the indictment is to charge a conspiracy to commit a specific offense, the only ones which would appear to be available are contempt, perjury, and obstruction of justice. There is one reported case where the charge was conspiracy to commit contempt, United States v. Kane, 23 F. 748 (Col. 1885). This, however, was before obstruction of justice was made a separate offense. A more recent case, Kelston v. United States, 294 F. 491 (3d Cir. 1924), cert. den. 264 U.S. 590, indicates that contempt and conspiracy are separable, and that an indictment charging a conspiracy to commit contempt would in effect be a conspiracy to obstruct justice. Indictments for conspiracy to obstruct justice by the presenting of false testimony or the concealing of true facts are not at all uncommon. See Outlaw v. United States, supra, and United States v. Minkoff, supra. Indictments for conspiracy to commit perjury are somewhat more unusual, but are not completely unknown. See Hall v. United States, supra, and United States v. Pettte, 147 F. Supp. 791 (D.C. Md. 1957).

A conspiracy which alleges that it had as its unlawful purpose the obstruction of justice by the commission of perjury, can be proved in the same manner as any conspiracy. For instance, the proof of the conspiracy need not be confined to the time during which the United States Court or grand jury (before which the false testimony was given)

was in session. In the case of United States v. Perlstein, 126 F. 2d 789 ((3d Cir. 1942), cert. den. 316 U.S. 673. there was a conspiracy to suppress evidence and to keep persons who were familiar with the facts from disclosing what they knew to any investigatory agency or body of a state or the Federal Government. The indictment alleged that this conspiracy was entered into two years before the Federal Grand Jury was convened, although it continued throughout. The court held that there must be a Federal court proceeding in order to have the obstruction, but a conspiracy can exist to obstruct justice which would be administered in the Federal courts in the future. Hence, we can take our proof of the conspiracy back to the Apalachin meeting, or even earlier, if we feel that we have evidence tending to show that the defendants were, at that time, in an illicit combination.

Another interesting conspiracy to obstruct ojustice case is United States v. Johnson, 165 F 2d 42 (3d Cir. 1947), cert. den. 332 U. S. 852, which concerned the bribing of a Federal judge. The conspiracy was proved by showing the misconduct of the defendant wirh reference to specific pieces of litigation in a district court. However, the indictment did not charge the defendant with misconduct in any particular case, or with being engaged in a conspiracy to do something illegal in any individual case. It was a charge of general conspiracy to obstruct proved by specific acts in individual law suits. Based on this reasoning, we should be allowed to prove the obstruction here even though the false testimony was given before other grand juries, or in other districts, so long as it is part of this conspiracy and we have overt acts in this district.

C. Obstruction of justice.

Having concluded that a conspiracy to obstruct justice is the most attractive approach, it is now necessary to examine the law in regards to the underlying substantive offense.

Section 1503 of Title 18, as applicable here, reads as follows:

> "Whoever corruptly . . . . endeavors to influence . . . . or impede any witness, in any court of the United States, ... in the discharge of his duty . . . . , or corruptly . . . . influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice shall be fined not more than $5,000 or imprisoned nor more than five years, or both."

The wording of the statute raises several obvious issues. At the outset the question is what does the word "corruptly" connote. In practice this word has been treated as almost a redundancy, since the courts have held that any endeavor to impede and obstruct the due administration of justice in a matter under investigation is "corrupt", so that neither payment nor threats need accompany an attempt to have someone conceal evidence, for it to be considered "corrupt". Bosselman v. United States, 239 F. 82 (2d Cir. 1917); Broadbent v. United States, 149 F.2d 580 (10th Cir. 1945).

The definition of a "witness" has also been interpreted broadly. Smith v. United States, 274 F. 351 (8th Cir. 1921). It has been held that a witness is any one who knows or is supposed to know material facts and is expected to testify or be called as a witness. United States v. Grunewald, 233 F.2d 556 (2d Cir. 1956), rev. on other grounds, 353 U.S. 391 (1957); United States v. Solow, 138 F. Supp. 812 (S.D.N.Y. 1956); c.f. Berra v. United States, 221 F.2d 590 (8th Cir. 1955), rehearing den. 350 U.S. 943, aff. 351 U.S. 131. In any event it is clear that a witness before a Federal Grand Jury is included within the terms of the statute. Davey v. United States, 208 F. 237 (7th Cir. 1913), cert. den. 231 U.S. 747. Further, the indictment need not allege that the defendant knew that the evidence he was withholding was material to the grand jury's investigation. United States v. Siegel, 152 F. Supp. 370 (S.D.N.Y. 1957).

As to precisely what constitutes an obstruction of justice, the scope of the statute has always been interpreted most broadly. As it was stated in Samples v. United States, 121 F.2d 263, 265, (5th Cir. 1941), cert. den. 314 U.S. 662:

> "The statute is one of the most important laws ever adopted. It is designed to protect witnesses in Federal courts and also to prevent a miscarriage of justice by corrupt methods. It is not necessary to its enforcement that a witness is prevented from testifying by threats or force. If a witness is corruptly persuaded to absent himself or to testify falsely the act is violated."

Indeed, it has been commented that: ". . . . the decisions under the statute are illuminating in their unwillingness to limit the court's protection from improper obstructions." United States v. Polakoff, 121 F.2d 333 (2d Cir. 1941), cert. den. 314 U.S. 626. So broad is the interpretation concerning the latter part of the statute ("impede the due administration of justice"), that Judge Weinfeld has referred to it as an "omnibus provision", all embracing and designed to meet any corrupt conduct in any endeavor to obstruct or interfere with the due administration of justice. United States v. Solow, supra.

It is clear, beyond peradventure, that inducing a witness to commit perjury is an obstruction of justice. Catrino v. United States, supra; Outlaw v. United States, supra. (See also the quotation from Samples v. United States, supra.)

Turning to the critical question of what evidence is sufficient to show that justice is being obstructed, we find that the courts have been quite liberal. In the landmark case of Bosselman v. United States, supra, the defendant was indicted for obstructing justice by inducing the altering of records of a company whose activities were under scrutiny by a grand jury. The evidence presented to the grand jury indicated that two employees, who were presumably accomplices, made alterations in the records. At trial, however, these persons testified that the alterations were not made at the behest of the defendant. They were confronted with inconsistencies from their grand jury testimony, but this was allowed in only for the purpose of impeachment. There was no direct testimony that the defendant had requested these changes, or that if changes were made, it was in anticipation, or during the pendancy of the grand jury investigation. The 2d Circuit Court, in affirming the defendant's conviction said:

> "The defendant further insists that, the proof against him being altogether circumstantial, a verdict should have been directed by the court in his favor. If men could not be convicted upon circumstantial evidence, many, if not most, serious offenses would go unpunished. In this case a very persuasive body of circumstantial testimony was proved. The sales lists and the shipping book of the Bosselman Company were altered, so far as appears, only in connection with the enteries concerning the three sales as to which charges against the defendant were under investigation by the grand jury. The alterations were made by employes who had no personal interest in the matter whatever, and were made by two clerks who had charge of different stages in the course of business. It is difficult to believe that this was done independently and accidently. The defendant being the only person having any interest in having the substantial proof. The jury was correctly instructed that they must be satisfied beyond a reasonable doubt of the defendant's guilt." (239 F. 82, 85).

D. Problems that would be encountered.

One of the problems we would be sure to face in such an indictment is that much of the evidence of an existing conspiracy is of a somewhat prejudicial nature, and the relevancy of much of it is doubtful. For example, the facts concerning the murder of Albert Anastasia would not be admissible, even though Barbara was in New York at that time and Anastasia's death created a jurisdictional vacuum in the syndicate. For the same reason, many of the facts showing the criminal purpose of the meeting would not be admissible.

It has been held repeatedly, however, that previous intimacy between persons charged with conspiracy is competent and important proof. United States v. Greene, 146 F. 803 aff'd 154 F. 401 (5th Cir. 1907), cert. den. 207 U.S. 596. It has also been held that evidence of a defendant's association with other persons engaged in committing the same offense as is charged in the indictment, is admissible as tending to show the conspiracy, and the means, preparation, and disposition to commit the offenses charged. Banning v. United States, 130 F.2d 330, (6th Cir. 1942), cert. den. 317 U.S. 695. Even assistance in the same kind of a crime which resulted in an earlier state prosecution has been held admissible to show such things as the relations between the parties. Wallace v. United States, 243 F. 300 (7th Cir. 1917), cert. den. 245 U.S. 650.

Proof of other crimes is not always incidental. Prior similar acts of a defendant are always relevant to prove motive, intent, identity and plan or design. Direct extrinsic proof of such acts is admissible, and the fact that such acts are criminal in character is immaterial. See e.g. United States v. Herskovitz, 209 F.2d 881 (2d Cir. 1954).

Where the facts of defendant's close association with other persons are relevant to indicate a motive for perjury, those facts may be placed into evidence. In United States v. Moran, 194 F.2d 623 (2d Cir. 1952), cert. den. 343 U.S. 965, Moran was charged with perjury for testifying that he had been visited by one Louis Weber only three times; evidence was admitted to show Moran's intimate acquaintance with Mayor O'Dwyer, since that would tend to establish a motive on Moran's part to protect O'Dwyer. That case also holds that relevant evidence of the criminal record of a person other than the defendant is admissible; the court approved the admission of Weber's gambling conviction:

> "The appellant next contends that error was committed in receiving evidence of the defendant's intimate acquaintance with former Mayor O'Dwyer and of Weber's convictions of 'policy' gambling in 1927 and conspiracy in 1938. Counsel argues that such proof was offered solely to besmirch the defendant and violates the rule that an attack upon a defendant's character is not permitted unless he has chosen to place his reputation

> or character in issue. But counsel misconceives the purpose of this evidence. It was not character evidence; it was relevant to prove that Moran was a man in high influential public office and that Weber was a man convicted of 'policy' activities. They had known each other for many years. Such a relationship tended to show the materiality of the statements made to the sub-committee investigating the link between politics and crime, and establish a motive on the part of Moran for minimizing the number of Weber's visits to him." 194 F. 2d at pp 625, 226.

This should serve as authority for admitting evidence concerning the relations and associations of the Apalachin attendants, even though they are not all named defendants.

In Devoe v. United States, 103 F.2d 584 (8th Cir. 1939), cert. den. 308 U.S. 571, where the prosecution was allowed to prove an overall conspiracy concerning a voting fraud, much of the evidence concerned general political corruption during the Pendergast reign in Kansas City, Missouri. Most of this conniving was in regards to the state elections and only a part of it concerned a violation of Federal laws, (election of a United States Congressman). These other facts were admitted on the theory that they were circumstantial evidence to (1) characterize the relations of the defendants; (2) cast light upon other prior acquaintance and association between the alleged conspirators; (3) show motive, common interest and design to make the charge of conspiracy probable; (4) reveal the character and related objects of the joint activities of the defendants; (5) show that the conspiracy charge was an integral part of a broader conspiracy and was so closely related to it that it could be legitimately made the subject of inquiry. The court said at page 588:

> "It is elementary that in the trial of a case, whether civil or criminal, relevant and competent evidence is admissible even though it tends to prove the commission of criminal acts, not in issue, by the party against whom the evidence is offered. Where evidence of transactions between those charged to have been associated in the commission of a criminal act throws light upon the particular transaction for which they were indicted, it is admissible, regardless of the fact that it tends to implicate the defendants in the commission of other offenses."

The fifth ground is of particular help concerning proof of the broader conspiracy whose existence was apparently indicated by the Apalachin meeting.

Another interesting point of evidence is the admissibility, to prove a guilty mind, of the fact that the defendants fled from the Barbara home when they learned that the police had surrounded the place.

> "It has long been recognized that flight, like the spoliation of papers, is a legitimate ground for the inference of guilt . . . . ". United States v. Heitner, 149 F.2d 105, 107 (2d Cir. 1945), L. Hand, Cir. J.

The major defect with this approach is that the guilty mind shown here might only be relevant to a charge of a general conspiracy to defraud. While the conspiracy can be alleged to have been in existence prior to the chargeable Federal offense, it would seem incongruous to state that the witnesses had indicated a guilty mind by fleeing before they had even committed the Federal offense. Therefore, I have some doubts as to the admissibility of the flight to show guilty mind, although it would probably get in as part of the res gestae, and is undoubtedly relevant to prove a motive for perjury. (I.e. since they fled they felt guilty of. something, and believing themselves guilty, they have a motive for concealment of the facts.)

CONCLUSION

An indictment would be sufficient, as a matter of law, against certain of the witnesses who have given testimony concerning the Apalachin meeting, for conspiring to obstruct justice by the presentation to a Federal Grand Jury of perjurious testimony. The problem of the sufficiency of the evidence against each of the prospective defendants depends upon a very fine line that must be tread between the relevant and unduly prejudicial.

MEMORANDUM

To: Milton R. Wessel Date: April 28, 1959

From: Gerard L. Goettel

Subject: The Sufficiency of the Conspiracy to Obstruct Justice Indictment

The conspiracy indictment attached is patterned after the indictment in the case of United States of America v. John Correa, et al. (CI34-137, SDNY -- the second string Puerto Rican nationalist trial), with certain additions taken from the indictments in the cases of United States of America v. R. Lawrence Siegel, et al (C 147-346, SDNY) and United States of America v. Hyman Harvey Klein, et al. (CI44-149, SDNY). The following material allegation of the Correa indictment is omitted: that it was a part of the said conspiracy that the defendants would influence a specific co-conspirator corruptly and by threats to give false information about the meeting to investigating agents of the Government and to give false, fictitious, fraudulent and manufactured testimony under oath about the aforesaid meeting before the aforesaid grand jury.

In the Correa case a motion was made to dismiss the indictment on the grounds, inter alia, that the indictment did not charge the commission of any offense against the United States and was so vague and indefinite and uncertain as to fail to apprise the defendants of the nature of the charge against them, and that if it did charge the commission of an offense against the United States, it was duplicitous and charged more than one offense within the same count. Judge Goddard, in a memorandum opinion dated June 8, 1951, denied the motion stating:

> "The first two grounds are clearly without merit. Each of the counts charges an offense against the United States by the defendants under Title 18, United States Code, Section 1503. The first count charges a conspiracy to willingly, knowingly and corruptly influence, obstruct and impede the due administration of justice; the second, a willful and corrupt endeavor to influence, obstruct and impede the due administration of justice by influencing a witness before a grand jury.
>
> "Since each count contains all the elements of the offense intended to be charged and sufficiently apprises the defendants of the nature of the charge against them so that they can prepare their defense and plead any judgment herein as a bar in any other prosecution, each count is sufficient. Cochrane and Savre v. United States, 157 U.S. 286.

(Attachment J)

"The third and fourth grounds are equally without merit. The first count charges but one offense -- a conspiracy to corruptly influence, obstruct and impede the due administration of justice. The fact that this count charges a conspiracy to commit more than one criminal act does not make it duplicitous. Outlaw v. United States, 81 F. (2nd) 805."

Part of their attack was predicated upon the fact that the indictment did not allege that the evidence suppressed was "material" to the grand jury investigation. While the Court held this allegation to be unnecessary, we have deemed it safer to include it in the indictment, thereby eliminating any further dispute over the issue.

The most important attack upon the sufficiency of the indictment, and one which is most particularly applicable in our case, in view of the omission of the paragraph from the Correa indictment charging that a co-conspirator had been influenced corruptly by threats to give false testimony, is the contention that certain of the counts charged only that the defendants failed to perform their own obligations as witnesses before the grand jury and that, therefore, if they committed any crime it was punishable only as a perjury or contempt.

The Government did not squarely meet this point stating that, whether that proposition was true or not, the factual situation in that case was that a "mute witness" (i.e. various documents) had been tampered with and that this had been done outside of court, so that the acts could not constitute either contempt or perjury. The Court, however, in denying a motion to dismiss, rested its decision upon a slightly broader ground, as follows:

"Assuming that the allegations of these four counts would sufficiently spell out a charge of perjury or contempt (but cf. as to contempt in re Gottman, 2 Cir., 118 F. 2d 425) that does not preclude them from being valid counts charging violation of Section 1503. The same transactions or acts may constitute a violation of two different statutes and a defendant may be tried for violating either or both provided the offense defined in one embraces an element or elements not included in the other. Gavieres v. United States, 220 U.S. 338, 31 S. Ct. 421, 55 L. Ed. 489; Catrino v. United States, 10 Cir., 176 F. 2d 884; United States v. Miro, 2 Cir., 60 F. 2d 58. The acts and endeavors to obstruct and impede the administration of justice which are charged in this indictment include the suppression or destruction of memoranda and documents and the manufacture of

other documents for purposes of passing them off to the grand jury as the originals, none of which took place in court or before the grand jury. These are not elements of the crimes of perjury or contempt which relate to the conduct of a witness on the stand. There is no reason why the defendants cannot be tried for these acts under the obstruction of justice statute." 152 F. Supp. 370-377.

At trial the defendants were found not guilty of the conspiracy charge, but were found guilty of some of the substantive acts charging them with obstruction of justice. However, concerning the substantive obstruction of justice counts, which charged the defendants with destroying their own documents, the appellants argued (page 27 appellant's Brief on Appeal) that "never before the indictments of July 13, 1955, has there been a reported case in which Section 1503 or its predecessor was applied to conduct amounting to a default in one's own duties as a witness." The exact point on appeal was "that the defendants were not shown to have obstructed justice." Concerning this the Court of Appeals said in a recent and as yet unreported decision "the other points raised by the appellants are too trivial to require discussion."

The Brief on Appeal used the phrasing of "indictments of July 13, 1955," since there was the companion case of United States v. Solow, on which a motion to dismiss the indictment had already been made and decided. (United States v. Solow, 138 F. Supp. 812, (SDNY 1956)). In that decision Judge Weinfeld stated that "counsel have not cited, nor has any research by the court disclosed, any Federal case directly on all four's with the instant one," (at p. 814). He held, however, that the latter part of Section 1503 was an "omnibus provision" and therefore covered the destruction of evidence by the defendant himself.

These cases seem to be sufficient authority for the proposition that justice can be obstructed by the acts of a defendant alone, without his having influenced the conduct of a third party. However, in these cases, there has been what they refer to in the Government's briefs as "mute witnesses" and the act of obstructing took place outside the presence of the court. I know of no authority, for or against an obstruction of justice, where all the defendants act in concert. The question here is not one of conspiratorial law, but whether the substantive offense itself can occur where there is a concert of action. Some crimes cannot occur where there is concerted action (e.g. rape), and if the crime of obstruction of justice by perjurious testimony be taken to require a passive party or agent, then it is clear that a conspiracy cannot be created simply by the naming of several active parties with the addition of co-conspirators who are equally active but who are not named as defendants.

It is my belief that a defendant can obstruct justice, in the popular sense, without acting upon or needing the consent of another person, such as by fleeing the jurisdiction or destroying some object which has been subpoenaed as evidence. However, most of these are specific offenses in and of themselves, (such as in our case the crime of perjury) and the question is whether we can get away with charging them with obstruction of justice because in addition to an individual perjury they have acted in concert with a resulting impediment of a grand jury investigation.

While this question will undoubtedly have to be faced at the conclusion of the Government's case, I think the wording of the indictment, particularly paragraph 9, is such that it will prevent this point from being raised on a motion to dismiss the indictment.

Furthermore, we can argue with some emphasis that the testimony of certain witnesses, such as Melvin Blossom and relatives of various attendants, have been influenced by the actions of the conspirators, and that the agreement of each defendant and co-conspirator to conceal, at any cost, the facts concerning the meeting, had the effect of inducing each of them into adopting this illicit course. In addition, I have in the first paragraph cited the perjury as well as the obstruction section, for several reasons: first, because the actual conspiracy here seems primarily to be a conspiracy to commit perjury; secondly, since we have some perjury counts in the indictment, it is quite proper, and indeed routine, to add this as one of the citations in the conspiracy since we are proving perjury in furtherance of the conspiracy by at least a few of the defendants. The inclusion of this perjury charge would seem to negate the necessity of showing an influencing of passive parties.

The first conspiracy paragraph also includes the general allegations of defrauding the Government (the latter omnibus provision of the conspiracy section), as taken from the Klein case, and United States v. Manton, 107 F. 2d 834 (2d Cir. 1939). I have not added a separate general conspiracy count, since all the acts in furtherance of the conspiracy would be those included in this count, indicating some doubt in our minds as to what the offense, if any, is.

Paragraphs 2 and 4 are put in for the following reasons: It is necessary to prove that at the time the conspiracy was entered into, the co-conspirators apprehended the fact that they would be witnesses called before a Federal grand jury. One of the best ways of proving this, I believe, is to show that there had been for a year and a half previously, a large scale and highly publicized investigation of racketeering and organized criminal syndicates being conducted in the Southern District, and, indeed, at least 4 or 5 of the

attendants had already been summoned before this grand jury and another 4 or 5 were subjects of its investigation. At the time of the meeting, a third, and successor Special Grand Jury was in session. It was before this grand jury that most of the Apalachin attendants were soon called. Since we are going to charge that the actual obstruction and perjury occurred before our grand jury, I deem it wisest not to become overly specific as to the dates of the impaneling of these Special Grand Juries. I would not want to hang everything on our grand jury alone, since it was so remote in time (impaneled 11 months after the meeting), as to make difficult the argument that the conspirators foresaw the possibility that they would be called before it. I have enumerated the various areas of concentration of the United States Attorneys' grand juries, since the great bulk of the attendants were active in one of the three.

The argument will probably be made that the common course of conduct of the conspirators did no more than aid and abet the invididual acts of each, and that there was no precedent illicit agreement. Our answer to that must be twofold: first, that the prevalence of the "sick friend" story indicates a preconceived concoction; and second, that without some sort of agreement guaranteeing a shielding of the truth, none of these persons would have dared offer such flagrantly false stories. There was, therefore, an influencing of co-conspirators to obstruct justice and commit perjury. Indeed, the evidence is overwhelming that a wall of silence and falsehoods such as has been created here, could have never been effected without the closest and most rigidly adhered to conspiratorial ties.

TO: Milton R. Wessel May 1, 1959

FROM: Marvin B. Segal

SUBJECT: The Grunewald Decision

Grunewald v. United States, 353 U.S. 391 (1957), was examined for its effect upon the conspiracy indictment contemplated by this Group.

> In Grunewald, the petitioners were convicted of conspiring to defraud the United States by preventing the criminal prosecution of certain taxpayers for fraudulent tax evasion. They had succeeded in obtaining "no prosecution" rulings from the Internal Revenue Service in 1948 and 1949. Other subsequent activities were directed at concealing the irregularities through which these rulings were attained. The conspirators were indicted on October 25, 1954. The relevant holding of the Grunewald case was the court's refusal to extend the scope of the conspiratorial agreement to include a subsidiary agreement to conceal the crime after the actual criminal purposes of the conspiracy had been attained.

The holding of the Grunewald case is a development of the theory evolved in Krulewitch v. United States, 336 U.S. 449 (1949), and Lutwak v. United States, 344 U.S. 604 (1953).

> In Krulewitch, the court was concerned with the admissibility of a declaration attributed to a co-conspirator which was made after the object of the conspiracy, transportation for prostitution purposes, had been accomplished. Admission of the declaration was error.

> In Lutwak, the question again involved the admissibility of a hearsay declaration of a co-conspirator after the main purpose of the conspiracy was achieved. The admission of a single declaration against all co-conspirators was held to be harmless error.

In both cases the Government attempted to extend the scope of the conspiracy by an alleged subsidiary conspiracy to conceal. The subsidiary conspiracy, as it was in Grunewald, was charged in the indictment in Lutwak, but was not charged in Krulewitch.

(Attachment K)

These cases presage the court's concern with two issues:

1. The theory of the implied or subsidiary conspiracy to conceal, as a reason for extending the Statute of Limitations relating to an agreement to commit a substantive offense, and

2. The concomitant extension of the period during which hearsay statements of co-conspirators would be admissible in evidence.

In Krulewitch, the statement which the Government sought to introduce in evidence was made after the offense had been accomplished, after the two principals and the witness had been arrested, and after the witness and the two principals had a falling out.

In this context, Justice Jackson's concurrence in the Krulewitch case, warned against the technique of: ". . . judicially introducing a doctrine of implied crimes or constructive conspiracies" (at p. 456). His attack was directed against allowing the law to impute to the confederates, ". . . A continuing conspiracy to defeat justice . . ." (at p. 456).

Recognizing the inherent 'elastic, sprawling, and pervasive', nature of the offense of conspiracy, Justice Jackson was concerned with condoning the use of concealment as a separate crime when it was logically an inherent part of the main conspiracy charge. Thus he reasoned if the Government wished to extend the Statute of Limitations by this means, it would be held to the strict proof that the concealment was, in fact, a separate objective, distinct and independent from the allegation of conspiracy to commit the substantive offense:

> ". . . Of course, if an understanding for continuous aid had been proven, it would be embraced in the conspiracy by evidence, and there would be no need to imply such an agreement. Only where there is no convincing evidence of such an understanding is there need for one to be implied." (Krulewitch, supra p. 455)

In Lutwak v. United States, equally concerned with making concealment a distinct objective rather than a supplementary aim of the conspiracy, the court stated at page 617:

> "While the concealment was alleged in this indictment as a part of the conspiracy, it was not proved."

Grunewald compounded the problem. There, concealment was alleged as a means for continuing the conspiratorial agreement not only beyond the point where the main object of the conspiracy had been accomplished, but where the Statute of Limitations relating to that agreement had expired. This device was specifically rejected by the court on the basis of the policy considerations outlined in Krulewitch. (See Grunewald, supra p. 404.)

Again the character of the conspiratorial agreement, its scope and objectives, were the basic considerations. Concealment qua concealment was not at issue. Rather, the Court sought to prevent the situation in which an integral aspect of the conspiracy was being used as the basis for charging a separate offense which would have the effect of extending the Statute of Limitations.

> "By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime."
> (Grunewald, supra p. 405)

The court demonstrated that there could be instances where the character of the agreement, by its terms, removes a statutory limit from the accomplishment of the crimes contemplated:

> "The Government also suggests a further theory in which this conspiracy can be deemed to have lasted into the indictment period. Under this theory, the central aim of the conspiracy was . . . to engage in the continuing business of fixing any and all tax fraud cases. If this were the aim of the conspiracy, acts of concealment, could have been in furtherance of this aim by enabling the ring to stay in business so that it could get new cases. . . (f. n. 20 p. 406)

Grunewald confirms this reading of the case by granting a new trial, because of an inadequate charge to the jury, based on the Government's alternative theory that the Grunewald conspiracy was aimed at immunizing the taxpayers from prosecution, and that the acts of concealment were in furtherance of this conspiracy.

The final holding is consistent with the traditional reasoning stated in United States v. Kissel, 218 U.S. 601, 607:

> ". . . When the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and . . . they do continue such efforts, in pursuance of the plan, the conspiracy continues up to the time of abandonment or success." (See also Fiswick v. United States, 329 U.S. 211, 216.)

The case proposed in the accompanying indictment avoids the problems raised by Grunewald.

1. There is no Statute of Limitations problem since the indictment alleges the conspiratorial agreement began on or about November 14, 1957.

2. The conspiracy, by its terms, contemplates a continuing effort to frustrate the efforts of the Government.

3. The main objectives of the conspiracy charged are acts of concealment.

4. Alternatively, if it be demonstrated that concealment is a subsidiary objective of the conspiracy, then such acts of concealment, within the statutory period, are still admissible in furtherance of the main conspiracy.

Fortunately Grunewald has no relation to the instant indictment. It is submitted that neither isolated quotation of the language nor the possible future applicability of its holding has any effect upon any issues the conspirators have standing to raise.